IN THE UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF NORTH CAROLINA

GRETCHEN S. STUART, M.D.,et al.,
Plaintiffs,
vs.
JANICE E. HUFF, M.D., et al., ,
Defendants.

Case No. 1:11CV804

Greensboro, NC

October 17, 2011

10:01 a.m.

TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING

BEFORE THE HONORABLE CATHERINE C. EAGLES

UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Greensboro, North Carolina

October 17, 2011

(At 10:01 a.m., proceedings commenced.)

THE COURT: Good morning.

MR. HICKS: Good morning, Your Honor.

THE COURT: I'll ask everybody to introduce themselves for me and the other courtroom personnel; and while you're doing that, if you would also let me know which one of you will be speaking for your table. So we'll start with the Plaintiff.

MS. PARKER: Good morning, Your Honor, Katie Parker with the ACLU of North Carolina for Plaintiffs. I'm here at cocounsel with Helene Kraznoff from Planned Parenthood Federation of America and Bebe Anderson with the Center for Reproductive Rights, and Ms. Anderson will be arguing for the Plaintiffs.

THE COURT: All right.

MR. HICKS: Good morning, Your Honor. May it please the Court, my name is Faison Hicks. I'm a special Deputy Attorney General with the North Carolina Department of Justice. I represent all the defendants here today. And with me is Stephanie Brennan, an Assistant Attorney General with the DOJ. She's my colleague, and I'll be making the argument this morning.

THE COURT: All right. Thank you.

All right. And before we start on the motions themselves, I just wanted to discuss the logistics of it with you. It's not strictly a TRO since the defendant is here and has had an opportunity to be heard. On the other hand, it's all been very fast as well. So I'm open to letting this be -- we can talk about this. You know, we can have the hearing today, just the argument; I can do whatever I do. We can have a couple of days -- I have a few days in December when you could have an evidentiary hearing if that's needed. Or if you think there might be a good bit of discovery or whatever that needs to be done, we could put that off until March or May. Just logistically, what do you all think is going to be needed?

MS. ANDERSON: Your Honor, Bebe Anderson for the Plaintiffs. We don't think this is probably a case that would require a lot of discovery, but obviously Defendants might feel differently, and I do understand they haven't had the case for long. So we're sort of open to hear what they feel their needs are. Certainly, we can put on an evidentiary hearing if that's needed and conduct whatever discovery is needed.

THE COURT: All right.

MR. HICKS: Your Honor, two answers to your question. In terms of this morning, what we would like to do this morning, if the Court has substantial questions

about the claims of vagueness of the statute, I'm certainly prepared to discuss the specific claims of vagueness that I have seen the Plaintiffs identify. If there are more claims of vagueness, I would note that the Texas court actually gave the parties, I think maybe under oral argument, the opportunity -- I think the Plaintiffs had a brief opportunity to submit a supplemental brief very quickly to the Court, I presume within a day or two, identifying all of their vagueness claims, and the Defendants then had a day or two to submit a down and dirty, very quick supplemental brief responding to each of those specific claims. The speed with which this has come on causes me a little bit of pause, frankly, about the vagueness claims. I'm not sure I fully comprehend all of them.

So I would simply note that for the Court and suggest that at least in the State's view that might not be a bad procedure here. Now, in the more long-term view of things, I think the State will probably want to take some discovery prior to an evidentiary hearing, but I don't see why that couldn't be done before December so that we could have the evidentiary hearing in December.

THE COURT: Okay. Anything else --

MR. HICKS: I'll certainly work with Bebe on that.

THE COURT: -- to add for the plaintiff on that?

MS. ANDERSON: Your Honor, certainly we are happy

to flesh out with the Defendants all the vagueness in the statute and see if they have explanations that could be then binding in some way and take care of any other vagueness in the statute.

However, I would also note that in terms of discovery, whether -- it depends on how much discovery the Defendants need whether we could do it in time to have an evidentiary hearing in December. I think the concerns about the statute should not require a lot of discovery, so that may indeed be feasible. On the other hand, it's just too early for the Plaintiffs to know whether that would be -- understandably, you know, Defendants don't yet know what evidence they may feel they need put on or what discovery they may need, and so it's hard to respond to that at this time.

THE COURT: Well, if we did do something in December, I was really thinking that it might just be still a preliminary injunction since that's still not very much time; and then if we needed to do something else down the road, we could. But -- so why don't we plan on being here a couple of days in December. The time that I have available is the week of the 5th, so I would suggest -- that's a Monday. I still think in terms of Mondays from my state court days. So I would suggest maybe the 6th and the 7th that we set those aside. Is that agreeable?

MS. ANDERSON: Yes, Your Honor. Thank you.

MR. HICKS: Did you say the 6th and the 7th?

THE COURT: Yes, sir.

MR. HICKS: Yes, Your Honor. That's fine.

THE COURT: All right. We'll set those aside for an evidentiary hearing if anybody ends up having any additional evidence they want to offer; and if not, we'll check in and see what needs to be done at that time, okay?

All right. I've read everything, so I think I'm ready to hear your legal arguments, and I'll hear from the plaintiff first. Ms. Anderson?

MS. ANDERSON: Thank you, Your Honor. Does my voice carry if I'm here without the microphone?

THE COURT: I can hear you.

MS. ANDERSON: Okay. Thank you. And also just to clarify, Your Honor, if I could before I get started, in terms of a potential evidentiary hearing in December, I'm assuming that would be if -- you know, obviously if the Court enjoins the statute, it would be an injunction that could carry through to that later date.

THE COURT: Well, since I don't know what I'm going to do, it would be -- if I grant you an injunction today, it would be an opportunity to see whether that extends. If I don't, it would be your chance to ask me again after putting on some evidence. So -- and kind of the

opposite for the Defendants. Go ahead.

MS. ANDERSON: Thank you, Your Honor. And I also wanted to thank Your Honor for scheduling this promptly, because, as you're aware, this act is scheduled to go into effect on October 26. And even though currently North Carolina, of course, requires that informed consent be obtained before any abortion, just as it's required for any medical procedure --

THE COURT: Actually, you know, I think you may have to use the microphone. I'm having just a little trouble hearing you. I don't know if it will pull over there to the lectern or not; and if it won't, I guess you'll have to do it from the table.

MS. ANDERSON: That's fine, Your Honor. And as I was stating that North Carolina currently requires that there be informed consent before any abortion is performed, just as is true for any medical procedure, and also currently requires that an ultrasound be performed before an abortion for medical purposes of dating. But the act imposes significant changes --

THE COURT: Was that -- can I ask you about that? Was that in the statute, or was that in just some regulations?

MS. ANDERSON: It's in the administrative regulations that govern facilities licensed as abortion

clinics, and it simply requires that it be documented that an ultrasound was performed. It does not have any of the sorts of requirements, of course, that are present in the act and that are caught -- you know, that are so problematic and constitutionally problematic.

THE COURT: All right.

MS. ANDERSON: So but clearly the act changes things tremendously for abortion providers, and it's also very confusing in parts, and it puts the abortion providers at risk of significant penalties without knowing exactly what they have to do. So we seek a preliminary injunction and a TRO to maintain the status quo here until there is a final judgment and a final determination of the constitutionality of the act.

And we've moved on several of our claims, though not all of them, but we've moved specifically to enjoin Section 90-2182 and the two other sections that are dependent upon it, which are 90-21.87 and 90-21.90, which relate to informed consent on vagueness grounds and then also Section 90-21.85 which sets forth the display and speech requirements in the act which we are seeking to enjoin both not only on vagueness grounds but also as a violation of free speech rights of physicians and also a violation of substantive due process.

So Plaintiffs feel they've adequately shown with

their arguments and their evidentiary submissions that they meet the requirements for issuance of preliminary injunctive relief; we're likely to succeed on the merits of the claims that we have briefed; and Plaintiffs and their patients are likely to suffer irreparable injury if injunctive relief is not granted; and the balance of equities tips in Plaintiffs' favor; and indeed an injunction to prevent unconstitutional provisions from going into effect will certainly be in the public interest.

Here, in terms of the types of irreparable injury and harm that will occur if there is no injunctive relief, those include that it violates the constitutional rights of both patients and abortion providers. It also puts providers in the untenable situation of having to comply with unclear requirements. It appears to put them at risk of criminal penalties, and it certainly puts them at risk of quasi-criminal penalties in form of licensure penalties as well as civil suits if they fail to comply with the act's requirements.

In addition, physicians, if this law goes into effect, would have to violate their ethical duties, which would harm them, their patients, and the practice of medicine generally, and then there'll be chilling in -- also of the precision of the constitutionally right of reproductive choice if this law is not enjoined.

So I'd like to turn first to the free speech claim that Plaintiffs have presented which relates to Section 90-21.85. This display and speech requirement in the act is unlike any requirement in force anywhere in the United States. There are two other states that have enacted similar laws, and in both of those states those laws have been enjoined. Most recently, the Texas law was enjoined by a Federal District Court, and a year ago the Oklahoma -- an Oklahoma state court enjoined Oklahoma's similar ultrasound requirements.

And the reasons that these requirements have not been upheld and have not been allowed to go into effect anywhere in the United States really goes to the heart of the issue that Defendants rely upon, their argument that this really is all just like what was allowed by the Supreme Court in Casey. Clearly, this is not at all like what was allowed by the Supreme Court in Casey. This is qualitatively unlike the provisions that were upheld by the Court, the provisions that were in that Pennsylvania statute that the Casey Court evaluated.

The statute -- the informed consent provision of the Pennsylvania statute that was considered by the Supreme Court went to a requirement that all patients receiving abortions be informed of risks and alternatives to the abortion procedure, which is standard informed consent

requirements.

In addition, the State decided that it had -- sorry -- the Supreme Court decided that its earlier decisions that precluded any information that related to the State's interest in potential life from being required to be presented to the woman had gone to far, and they said it was allowable -- the Supreme Court said it's allowable -- or may be allowable for the State to make available to women or to require that physicians make available to women State-prepared materials that present information such as fetal development information and also information about benefits and services that may be available to women if they choose to continue their pregnancy. And that's really what the Supreme Court allowed in the Casey decision, and that is totally unlike what is in Section .85. It's very similar to what is in .82, though there are other problems with how North Carolina tried to put those requirements into place, which I'll get to in a moment.

But here, unlike the statute in Pennsylvania that the Supreme Court considered, this statute in North Carolina requires that every woman seeking an abortion come in four hours before her procedure for the specific purpose of having an ultrasound performed by the physician for the purpose of generating images from her body, which then the physician must describe and explain in particular ways

mandated by the State, and she has to do that before she can have an abortion. And those requirements go far beyond simply requiring that a woman know that the State wants to encourage her to continue her pregnancy to term.

Rather, as is evident from the defendant's own explanations of these requirements, the requirements are meant to convey the State's opinion on the woman's decision-making and on the woman's relationship with her own particular specific pregnancy. And irrespective of the woman's circumstances, for every woman, she's -- and irrespective of her decision-making priorities and of her desires as to what information or experiences she wants for her decision-making, the State is requiring that all women seeking an abortion be subjected to this experience of having to come in, have this ultrasound performed for this purpose of generating images from her body and having that speech that the State mandates be provided by the physician; otherwise, the woman cannot obtain a legal abortion in North Carolina if that requirement goes into effect.

So there's nothing at all comparable in the Pennsylvania statute. There's nothing in the Pennsylvania statute that the Casey Court considered that required that a medical procedure be performed on a women before she could give informed consent for the abortion. There's nothing that requires her body be used to generate information that

the State wants her to have. There's nothing requiring a physician to subject the woman to unwanted images and unwanted speech and nothing requiring a woman who doesn't want those images and/or that -- to hear that speech to contort herself while she's there in the physician's office, in the clinic, having an ultrasound performed to contort herself to avert her eyes and to somehow refuse to hear what the physician is required to utter as the mouthpiece for the State.

So the Court in Casey did not -- the decision there cannot be -- possibly be read as allowing this requirement to go into effect. The Court did not address anything like it. Moreover, the Casey Court cannot be read as providing carte blanche to the State to do anything they want in order to support their interest in potential life.

Again, in upholding the Pennsylvania statute, the Court was really reacting to its view that it had gone too far before and had limited too much what the State could do, but it did not say the State may do anything. Instead, it may be permissible for the State to make some -- to require that some information be available, and it certainly did not rule that the State can go to absolutely any lengths to force upon a woman information about her embryo or her fetus.

So here the court has gone -- the State has

certainly gone too far, and that's where we get into the First Amendment claim here that is so different from the First Amendment compelled speech claim at issue in Casey.

As the federal court in Texas decided in construing a very similar set of requirements there, the strict scrutiny should be applied here, and it should be applied here for either of two reasons: Either because it is ideological speech or because it is -- has to be viewed as intertwining both elements of commercial and noncommercial speech when you're talking about the conversation -- excuse me -- the conversation between a woman and a physician prior to obtaining the medical procedure.

But I think here it is very clear, and it's even clearer now after the defendant's opposition brief was filed, that what we're really talking about here is ideological speech. Here, the Court -- here, the State is requiring this entire package of experience that must be imposed upon any woman before she can get a lawful abortion, and this -- these requirements and this package of coming in early, getting the ultrasound, limiting who can perform it, requiring the speech, inflicting this experience on the woman, the State has explained it is done for -- to give her, quote, an opportunity to educate herself about her unborn child before electing an abortion, end quote. It's

designed to, quote, arm the woman with realtime visual and auditory information about her pregnancy and the particular fetus living within her. It's supposed to provide the pregnant woman with new and important information via, quote, looking and listening to this information prior to what they call the 4-hour cooling-off period which will influence her understanding of her condition, her options, and the best interest of herself and her unborn child, end quote.

And then the State goes on to explain that these requirements are going to make the woman who, quote, resists the powerful urge to see her unborn child in a realtime display, end quote, quote, contemplate the loss of the unique opportunity for at least four hours and then puts the woman in the position of having to, quote, resist the State's efforts to get her to change her mind before -- end quote, before she can obtain an abortion. Those statements by the State show this is far beyond trying to inform the woman's decision in trying to make sure that information is provided to her. It inflicts this experience on her for the particular purpose of causing her to view this decision the way the State views the decision, and it's clearly the ideological view of the State in terms of what should be informing the woman's decision-making and in terms of how the woman should prioritize and also what the woman must --

how the woman must react to these experiences, how a woman is expected to react to these experiences.

So it's clear that the State is insisting that each woman be provided -- be mandated to be provided with an experience that will, quote, cause her to understand her unborn child in a new light and make her see her abortion decision through the State's lens, the State's ideological view of abortion, not her own decision-making process that has led her to seek an abortion, which is why she's there.

So Defendants have not met their burden of showing the requirements of 90-21.85 are narrowly tailored to compel any State interest which is the burden they then have. They've asserted two interests to try to support the display and speech requirements. The first interest they assert is to protect women from psychological harm. The State claims that its requirement that physicians put the ultrasound screen in the woman's view and provide them mandated description and explanation to every woman is needed to protect every woman seeking an abortion against, quote, the risk that she will subsequently suffer psychological and emotional injury, potentially permanent, from seeing a sonogram or hearing the heartbeat of a human fetus, end quote.

For starters, the State presents absolutely no evidence at all to support that there is a risk of such

psychological harm that any -- that women are harmed if they have an abortion without having been forced to have this image put in their view and hear this explanation and then later seeing an image of a fetus or hearing a fetal heartbeat. And it seems their argument seems to be premised on a faulty assumption also that women who have abortions have never seen an image of a fetus or never heard a fetal heartbeat, which is, of course, belied, in part, by the fact that the majority of women in the United States who seek abortions have had at least one child by the time they -- when they seek an abortion.

And, moreover, Plaintiffs have put evidence in the record that show -- that contradicts the State's claim that actually women's psychological health will be protected by these requirements. We have evidence from Dr. Stotland who is a well-credentialed mental health professional, and her evidence shows the lack of support between the link for abortion with psychological harm and also the potential for harming women by forcing these experiences on them as the State would do. Dr. Lyerly, an expert in medical ethics, also provides evidence about the harms that come from inflicting unwanted experiences on a patient when she's seeking medical care, which is one of the reasons why these requirements put physicians in this dilemma of having to violate medical ethics if they comply with the law's

requirements. And then both Dr. Stuart's and -- Dr. Stuart and Dr. Dingfelder relate circumstances from women's actual experiences that show the type of harm that would come from imposing these requirements on women based on actual circumstances of women's lives.

Even if the State had met its burden, which it hasn't, of showing that this interest in psychological -- avoiding psychological harm and protecting women's psychological health was furthered by the statute, they would fail because they've failed to show that this is narrowly tailored. Clearly, it would be much much less restrictive if the State had required, as many states do now, that the woman be offered the opportunity to view the image and have, you know, any questions she has answered by the physician. In fact, there's evidence in the record to show that is indeed what happens now in North Carolina, that women are provided the opportunity to see the ultrasound image, and, of course, allowed as part of the dialogue with the physician to ask questions. And such a narrow tailoring would be more in conformity with medical ethics and respect for the patient's decision-making and the patient's autonomy.

And so, for example, if that were the requirement, that would mean that the woman who was seeking an abortion, for example, because she has a very serious or even fatal

fetal anomaly has been diagnosed, or say she's a victim of a rape, she would not have to have the image put in her view and the image described to her. She would be able to decline that offer and not have to contort herself to avert her eyes or somehow refuse to hear.

The second interest that Defendants assert is somehow served by the requirements of the display and speech requirement is, quite frankly, a little baffling to Plaintiffs which is this interest in preventing coercion of women, and they have presented no evidence, for starters, to indicate that women in North Carolina are being coerced and they're having abortions. But even more importantly, they don't even present a remotely plausible explanation for how forcing these experiences on a woman seeking an abortion could prevent women from being coerced into having an abortion.

So as to that interest, not only is it clearly -- the statute's clearly not narrowly tailored to further it, it doesn't further it in any way. So for all of those reasons, Section 90-21.85 should be enjoined in its entirety, Your Honor.

Now, there are also vagueness problems with the act --

THE COURT: Well, let me ask you before you move on to that. So do you see any distinction at all between

for purposes of your First Amendment argument for the actual speech that's required describing what's seen on the ultrasound screen and offering the patient the opportunity to listen to the fetal heartbeat and placing the screen so that the patient can see it? You know, those are three discrete acts. Are they all the same for purposes of your argument? How is placing the screen speech?

MS. ANDERSON: That's symbolic speech, Your Honor, and the Supreme Court has certainly recognized that speech includes symbolic speech -- wearing arm bands, for example, is the classic example, and that it's certainly -- speech is not limited to articulated words, much less words. So, for example, a billboard would be speech even if it only has images on it, it doesn't have any words on it. So both the putting -- forcing the physician to put that image in the woman's view and forcing the physician to speak and provide the selected description that the State requires of the image, those are both compelled speech and have the problems I just mentioned.

Requiring an offer, on the other hand, would be simply -- it would be more in line with providing information to the woman. It would not be compelling the content of the description. It would not be compelling the physician to -- again, do the symbolic speech of putting that in her view.

For example, the statute itself does have one offer in there. It has the offer of trying to make the heart tone audible if it's present, and we are not contesting that that -- if that were all that was in there, if that were the statute, if the statute were simply requiring that the physician tell the woman that if you want me to, I can try to see if the heartbeat is audible, do you want me to? We would not be challenging that. It's in there as part of the entirety, though, which again it's this package, Your Honor, which shows so clearly the ideological nature of what the State is requiring because it's requiring all of this without any regard again to the individual patient, to her circumstances, to her desires. It forces the physician to say particular things and to take particular symbolic steps that amount to symbolic speech and goes, again, far beyond anything that's been upheld by any court in this country.

THE COURT: Okay. Thank you.

MS. ANDERSON: Certainly, Your Honor.

As to vagueness, I want to turn first to Section 8290-20.82. As I mentioned, that is the section of the act that has some relationship to what was looked at by the Supreme Court in the Casey case. But what they managed to do is they've managed to confuse the requirements in a way that leaves the providers unsure of exactly how they can

meet those requirements.

The Defendants themselves acknowledge in their opposition brief that the act contains what they refer to as, quote, imperfections, imprecisions, and inconsistencies. It certainly does, and those put the abortion providers in the dilemma of needing to comply with the act to avoid licensure penalties, civil remedies, potential criminal penalties, and knowing how to set up their practice to be performing lawful abortions, but not being sure of exactly how they can do that.

And the Plaintiffs have put in evidence to the Court explaining why the meanings of the provisions are unclear, and Defendants have put in no contradictory affidavits or explained how one can possibly understand what these portions mean; and even if they did, of course, we would need a binding court order for the physicians and abortion providers to be protected because they're really in this untenable position of being forced to comply and facing these significant penalties.

With reference to to 90-21.82, the key issue is really who can provide the information that is required 24 hours before and is required by .82(1) to be provided in person by -- either in phone, over the phone, or in person, but orally to the woman seeking an abortion. It starts out very clearly. The beginning portion of that section states

that the required information must be provided by the physician or a qualified professional, and then they define the term "qualified professional."

But then when you look at the individual components under that, that's where the lack of clarity comes in. It seems that the State has clearly intended to allow that information to be provided by a physician or registered nurses, nurse practitioners, physician assistants, or qualified technicians, but then they go and say in several places that information is done in a consultation with a physician, gestational age, probable gestational age is determined by the physician, and at one point they refer to the physician or -- a referring physician or a qualified technician, totally -- again, contradicting the opening piece which says that all of the information can be provided either by a physician or by a qualified professional.

So the most reasonable reading, Plaintiffs feel, of 90-21.82(1) would be to accept the clear beginning portion which lays out that any of this information can be provided by either a physician or a qualified professional as defined in the act. But given the internal contradictions within that provision, abortion providers cannot safely assume that's what the State meant, and, therefore, they're left at this risk if they make that

assumption given the actual wording that the State used.

Also vague, and this relates to both .82 and Section 90-21.90, is this issue about the State materials and the reading of the State materials. Section 90-21.90, which is termed "assurance of informed consent," it amplifies the requirements of 90-21.82 related to the State-prepared materials that the act mandates.

Again, .82 seems clear. It says that a woman has the right to review those materials, and she's to sign a form saying she had the opportunity to review the State-prepared materials. Then when you get to .90, it becomes unclear. And by the way, the part in .82 is comparable to the Pennsylvania statute where -- and the Court uphold the Pennsylvania statute in part because it says the State can require that you make available State-prepared materials about fetal development and that women then have a choice whether to view them or not. That's exactly what was in Pennsylvania, and the Court said that was acceptable.

That's what seems to be in .82(2) until you look at .90, which seems to require that if the woman is illiterate, either because she's unable to read English or Spanish, the two languages in which the State materials must be prepared, or she can't read in any language, it appears to require that the physician or qualified professional has

to read those materials her. So -- but it doesn't make sense that a woman who can read either of those languages does not have to read the State materials. She simply has to know they're available and have the opportunity to review them if she wants to; and, yet, these other women are going to be forced to have to have these materials read to them, and the physician will be forced to have to read them to them.

So, again, there's contradictions within the statute that leaves abortion providers unclear on how they can safely comply with the act and protect themselves and ensure that they're performing a lawful abortion. It seems the most reasonable reading would be the reading that's in .82, which is that all women have to have the -- be informed of the availability of the State materials and be provided the opportunity to review them.

So, for example, a woman who can't read in English or Spanish can have her translator inform her what's in those materials just as the statute allows her translator to translate other information that the act mandates; and if the woman is illiterate, perhaps there needs to be a recording of what the materials say that she can listen to. But that isn't how the law is written, so it's unclear how providers can safely comply with this act and what their obligations are if they have a woman who is not able to read

the State materials.

And then finally in terms of vagueness, in addition to its other problems, which I've discussed, the display and speech requirement has a lot of unclear requirements within it. For starters, it uses -- it restricts who can do an ultrasound to a physician -- the particular type of ultrasound that the State's now requiring in this act is very different from the current requirement. It says that that can only be provided by limited categories of qualified persons, not by all the people qualified to perform an ultrasound as is currently allowed. It limits it to the physician who is going to perform the abortion or a qualified technician, as they define the term.

Then the State defines the term to include a term that makes no sense in terms of actual medical practice in North Carolina, because one of the categories of a person who supposedly can be a qualified technician and meet the requirements of .85 is an, quote, advanced practice nurse practitioner in obstetrics, end quote. But that, as we've put in evidence to show, is not a term that has meaning in North Carolina medical practice.

One has to assume the Legislature did not intend to put in a totally meaningless term, but then one is left with the quandary of how does one interpret that requirement? Perhaps it means that either an advanced

practice nurse, which is a term that's used, or a nurse practitioner, another valid term, if either of those categories of professionals has experience working with pregnant women, thus, have experience in obstetrics, perhaps those are what is meant by this term, and it just sort of put -- it left out the "and" somewhere in the middle? But, again, it's not safe for abortion providers to assume what it means. So that requirement of actually who is allowed to satisfy the requirements of the ultrasound law are not at all clear.

Another lack of clarity in that Section .85 is the requirement that the auscultation of the fetal heart tone be done in a, quote, quality consistent with the standard medical practice in the community. There is no such medical practice in the community because there is no medical practice to make heart tones audible for women seeking abortions. That is something that's part of obstetrics practice, it is not something that is part of abortion practice. So, again, abortion providers do not know how they are supposed to comply with that requirement.

And then finally, the most confusing part is this 72-hour provision which states that if the woman has had an obstetric display of a realtime image of the unborn child within 72 hours before the abortion is to be performed, the certification of the physician or qualified technician who

performed the procedure in compliance with this subsection shall be included in the patient records, and then the requirements of this section shall deemed to have been met.

It's subject -- this requirement is subject to many contradictory, inconsistent interpretations which we've laid out in our brief, but it appears the Legislature is basically either trying to provide some sort of a limitation such that the ultrasound has to be performed not just at least four hours before, but within a 4- to 72-hour window, or that it's meant to be some sort of exception that perhaps if the woman goes to a different facility and has an ultrasound performed, and then the people at that facility comply with the requirements of .85 and then document that and send her -- and then she decides to have an abortion and goes with that documentation, and it's within that limited time window, maybe that's what it's meant to be. But it really is impossible to know what it meant.

And I think that it's clear, though, that the Legislature intended something by this and may indeed have intended to, as I say, provide an exception and thus sort of broaden the requirements of .85. So the vagueness of that section can best be cured by actually enjoining the entire Section 90-21.85.

Finally, just briefly to mention the substitute due process claim that Plaintiffs have brought. If Your

Honor does not decide that Section 90-21.85, the display and speech requirements, must be enjoined because it violates the free rights of physicians or because of all the vagueness problems I just mentioned, at a minimum it must be enjoined as to those women who choose to avert their eyes and/or refuse to hear the explanation because it is not even rational to think that any State interest is served by forcing those women to come in four hours before their abortion and then waiting four hours to contemplate information or images that they didn't see or hear.

And, of course, if that's the case and those women are not subject to that, that would require that clearly when people are scheduling their abortions, the abortion facility would need to inform women, well, there's a requirement right now under the State law -- the new State law that you have to have an ultrasound in a particular manner of a particular type for a particular purpose done four hours ahead of time, and as part of that you'll be -- we'll put the screen in your view, and we'll describe, in the way the State's told us we have to, the image that's on the screen. Now, if you don't want to have that, you don't have to come in four hours ahead of time.

Well, obviously if that's done, that creates a disincentive for any women to come in four hours ahead to have that process which clearly the State did not intend to

create a disincentive for women to choose to view the screen and hear the explanation. So that flaw means that really this whole -- it really strikes the whole section because it doesn't make sense to require it for those women, but it doesn't make sense to accept those women in the logical way that I just described.

THE COURT: So there you're not making an undue burden argument, right? You're not making that undue burden argument that appears in so many of these cases at this time. I know you have it in your Complaint, but you're not making it at this time, right?

MS. ANDERSON: At this time we are not making an undue burden claim; that's right, Your Honor. We're saying that this requirement doesn't even satisfy a rational basis. It is just that bad.

And so it is simply -- you know, the State has strained to come up with interests that are served by this requirement that all of these women, you know, whether they want -- the women that are going to avert their eyes and refuse to hear it, it says that they have to come in, but it doesn't make any sense to say that it advances any interest in fetal life to do that, and there's certainly no support in either evidence or logic to support the State's assertion that there's some sort of psychological benefit to women to be forced to undergo what they have termed this 4-hour

cooling-off period before they are able to obtain the abortion that they've decided to have when they haven't even looked at the image and heard the explanation.

And just finally, Your Honor, the balance of equities really weighs in favor of Plaintiffs, and, therefore, it justifies that an injunction be issued. The Government won't be harmed by being prevented from enforcing these unconstitutional requirements. There's no administrative burden on the State that's going to be present if this is enjoined. There's certainly no cost on the State that's going to be present if this is enjoined.

And enjoining this would maintain the status quo. Women will continue to have informed consent. Physicians will continue to be required to obtain informed consent from any women seeking abortion, just as is currently the law in North Carolina, and they will continue to perform a pre-abortion ultrasound, and women will, you know, be able, if they want to, see the image or hear a description, but there wouldn't be these unconstitutional requirements imposed. And for that reason also, an injunction really does serve the public interest.

And it's clear in the cases we've cited in our papers that upholding constitutional rights is in the public's interest and that there's a -- there's also a strong public interest in maintaining the integrity of the

medical profession and the physician-patient relationship, and, as the evidence we've put in shows, this act actually undermines those.

THE COURT: So let me ask you one more question about the First Amendment argument. So the Government can compel physicians to tell patients -- to give patients certain truthful and non-misleading information about medical procedures. Do you agree with that generally?

MS. ANDERSON: As part of informed consent, one of the categories that's allowed that's supposed to be covered is indeed the medical procedure that the person is contemplating having.

THE COURT: And so why doesn't this -- what's required by this statute fall into that category?

MS. ANDERSON: This is entirely different from that, Your Honor. This is requiring that an experience with a particular purpose and designed to achieve that purpose -- the State's purpose is imposed upon a person. This is not requiring, as in Casey, that the woman have information about her procedure, about her alternatives, about the risks of her procedure and the alternatives. That's classic informed consent information. And the State is clearly -- as the court in Casey said, the State is clearly allowed to regulate the profession of medicine in ways comparable to other medical practice and that informed consent is

something that's required for all medical practice.

But you don't see another medical practice, and it's not allowed here, and nothing in court decisions say it can be, for the State to come in and say that you have to have -- require women to undergo a particular experience to extract information and images from their body and show those to the women and describe those to the women in order for them to have a medical procedure. That is totally outside normal informed consent. And one of the things that show that it's totally outside it is Dr. Lyerly's declaration which explains the informed consent process and the requirements that, as part of that, though there are certainly categories of information that have to be provided to a patient about a procedure, there's also a limit to how much you tell the patient.

You don't tell -- you know, the patient has the right of patient autonomy and decision-making as part of -- that's what informed consent is supposed to do, allow the patient -- information to allow the patient to make an informed decision as to whether or not to get medical treatment.

And so there are -- it's not unlimited what a physician can say. The physician cannot go into any level of detail simply as part of informed consent. It is supposed to be guided in part by the level of detail that

the woman wants.

Here, this requirement makes -- it doesn't allow for the woman to say, well, maybe I want some explanation, no explanation. They basically have -- it's an all or nothing situation or, you know, except to the extent she can somehow refuse to hear. So that is totally contrary to the normal informed consent process, which is, of course, part of the regulation of medicine.

And also cases make clear that the State doesn't have an unlimited right to regulate the practice of medicine, and physicians do not lose all free speech rights. Certainly, the court in Texas reviewing that statute recognized that. The court in Florida in the Wolfanger case recognized that. And the court in Casey also did not say that all information is allowed to be required, that in particular ideological speech cannot be required.

And as I've explained here, when you look at the totality of this section, the display and speech requirement, it is clear this really is ideological speech. It is not simply information at all like what is required under informed consent.

THE COURT: All right. Did I cut you off before you finished?

MS. ANDERSON: No, Your Honor. Just again, we would seek an injunction to protect abortion providers and

their patients from the harm that would otherwise come if this act goes into effect on October 26 or thereafter.

THE COURT: All right. Thank you.

MS. ANDERSON: Thank you, Your Honor.

THE COURT: All right. For the defendant?

MR. HICKS: Your Honor, may it please the Court, again, my name is Faison Hicks, and I represent the State.

Before I begin my prepared remarks, I would like to address the point that Ms. Anderson made about how this case is completely different from all the other abortion informed consent statutes that have come before the Supreme Court in other courts in that it involves a statute which compels a physician or other health care provider providing abortion services to -- it sounds to me like what they are really saying is to not only make this information available to the patient, to the woman, but to make it available to the woman in a way that she can't avoid actually receiving hearing the information, seeing the information, and otherwise processing the information.

THE COURT: Well, isn't that what it does?

MR. HICKS: No, ma'am, it does not.

THE COURT: How do you refuse to hear?

MR. HICKS: You don't have to -- well, the answer to that question is this. As I understand the statute, the physician is required to perform an ultrasound, and he will

have a screen in front of him, I presume, a monitor in which he'll be seeing the ultrasound image. The patient, I presume, will be laying on a table or sitting on a chair. The physician could easily position a monitor at a 90-degree angle to the right or left of the patient's head with the patient facing this way so that the patient would have to turn 90 degrees this way or that in order to see the monitor.

Furthermore, Your Honor, the arrangement, as I understand it, could be done in such a way that -- I don't know whether anybody else in this courtroom is old enough to remember this, but I'm certainly old enough to remember attending a lot of depositions and going to a lot of trials where the court reporter wore a mask. It's a dictation mask, and the court reporter speaks into the dictation mask in a normal tone of voice, and yet no one in the courtroom or the deposition can hear what he or she is saying. The deposition mask is connected electronically to some recording device.

I presume that what would happen here, or at least one option that could happen here, is that the dictation mask into which the physician speaks as he or she is looking at the sonogram monitoring screen would be connected to earphones that the woman would wear that would have an on/off switch so that the woman would be in complete control

of whether the information came to her or not.

So the State rejects the Plaintiffs' underlying argument that this is information that's irresistible, that is going to bombard the woman in a way that she can't avoid it, she can't avoid hearing it, she can't avoid seeing. That's, in our view, simply not so. The woman does have every opportunity to simply decide do I want to receive this or do I not?

Have I answered the Court's question?

THE COURT: So you're saying to comply with this statute, the health care provider would need to buy this special equipment?

MR. HICKS: I'm saying that is one way that a health care provider could clearly comply with this statute by simply acquiring the equipment that court reporters I know used to routinely use and probably still do so that --

THE COURT: Okay.

MR. HICKS: I didn't mean to cut you off.

THE COURT: No, no, I was saying okay, yeah.

MR. HICKS: Your Honor, I'd also like to hand up for the Court a copy of 10A NCAC 14E.0305. I have additional copies. I think Ms. Anderson is already aware of it. But just for the record and as an ease -- to be easy on the Court, this is a copy of the administrative regulation that goes back to 1976, I believe.

THE COURT: Nineteen, what did you say?

MR. HICKS: Seventy-six, February 1, 1976, that says, among other things, in subpart D, that an ultrasound examination shall be performed and the results posted in the patient's medical record for any patient who is scheduled for an abortion procedure. There's nothing new about the performance of an ultrasound procedure in connection with abortions. It's routinely done.

The ultrasound in this case under the act could be performed. It could be scheduled certainly within a 72-hour time frame. It could be scheduled such that the patient would come in and have it performed and have the information made available to her if she chose to perceive it and then have either a 72-hour period or 4-hour period within which to consider the information as it informs her decision. So I wanted to point those things out to the Court before I began my argument in chief.

Your Honor, in the State's view, the key starting point for determining whether the Plaintiffs' motion for a preliminary injunction should be granted is the determination of what is the proper legal standard by which the act should be analyzed. The Plaintiffs claim that the proper legal standard is strict scrutiny, by which they really mean the act should be held to be unconstitutional on its face without any analysis at all of the interest that

the act furthers, because that's what strict scrutiny really means.

But the Supreme Court's decision in Casey carefully identified the analytical framework that courts should employ in evaluating the constitutionality of statutes imposing informed consent requirements on health care providers in the abortion context. The State believes, Your Honor, that the Casey decision cannot be read reasonably as being anything other than a directive by the Supreme Court -- well, an analytical framework that is mandated by the Supreme Court for a genre of controversies, namely, abortion informed consent cases.

The Casey Court did not limit the applicability of this holding, it merely took the unique requirements of the informed consent statute at issue in that case. Rather, the Court laid down generalized principles that the lower courts are to apply in analyzing all informed consent to abortion statutes which are challenged either as unconstitutional because they allegedly force speech by physicians or which are challenged as unconstitutionally inhibiting a woman's right to obtain an abortion.

Just as in Casey, the Plaintiffs here challenge the statute at issue facially as an unconstitutional requirement that they --

THE COURT: If you can just slow down just a hair.

MR. HICKS: Oh, sure.

THE COURT: So I can --

MR. HICKS: I'm sorry, Your Honor.

THE COURT: That's okay. I hear, you know, southern.

MR. HICKS: Yes, ma'am.

Just as in Casey, I would merely point out that the Plaintiffs' challenge here is a facial challenge to the constitutionality of the North Carolina act on the ground that it allegedly forces the physicians and other health care providers to engage in speech with which they do not agree. In that sense, it's right on point with Casey.

Just as in Casey, the Plaintiffs here challenge the statute at issue, again on facial, constitutional grounds, as a restriction on a woman's right to have an abortion.

Also just as in Casey, the Plaintiffs here are physicians and abortion health care providers.

And just as in Casey, the statute at issue here is a statute which requires health care providers in the abortion context to provide specifically identified information to the woman seeking an abortion in order to fulfill the health care provider's legal duty to obtain the informed consent of the patient.

Now, the Court, if I recall correctly, in

Ms. Anderson's argument asked Ms. Anderson a question that I took to mean what is the difference in principle between the information that the court in Casey said was constitutionally permissible and the information that's required by the North Carolina act that Ms. Anderson and her colleagues believed is not admissible? Your Honor, from my perspective, from the State's perspective, although the information is not the same, it's different information, it is all the same in the sense that it is information that is designed to inform a woman's decision about the question of whether to have an abortion or whether to carry a child to term.

These statutes are always going to be different. Each one will have its own requirement -- unique requirements as to what sort of information is conveyed, but the key point in Casey was that so long as the information conveyed is information that meets the requirements laid down by the court there, including specifically that it inform the woman's decision and not be designed to restrict, that that sort of statute is constitutional.

Now, the legal standard that the Casey Court held appropriate for challenges to the constitutionality to form the consent to abortion statutes is what the Court referred to as the undue burden statute. Under this legal standard, the undue burden on a woman's right to obtain abortions

exists such that the statute is invalid if the statute's purpose or effect is to place substantial obstacles in the path of the woman seeking an abortion prior to the time that the fetus becomes viable. Put another way, this standard means that the statute at issue may not prohibit abortion prior to fetal viability or impose a substantial obstacle to, and I quote, the woman's effective right to elect the procedure, closed quote.

The Court also held that an informed consent to abortion statute imposes a substantial obstacle to a woman's effective right to elect an abortion when the statute, and again I quote, hinders the woman's free choice rather than informing it, giving what I believe is a strong indication of what the Court believes is appropriate in these acts; that is, information, something that will inform the woman's decision about whether to elect an abortion or not, something in the nature of information that will provide the woman with a mature and rational basis for deciding either to carry the baby to term or to submit to an abortion.

And the Casey Court went on to say that what was at issue in that case, and I believe in all of these consent to obtain an abortion statutes, is the woman's right to make the ultimate decision whether to have an abortion. What is not at issue is a right to be insulated from all others in doing so. Again, I think the Court is telling us something

about what the permissible purposes of these statutes are. And one permissible purpose of a statute like the act that's at issue today is for the State to inform the woman of a number of things, the moral consequences of an abortion, the consequences to the fetus, the potential consequences to her future psychological and emotional health as the court supposed them to be and determined as a matter of fact they were.

The Casey Court went so far as to say that to promote the State's profound interest in potential life throughout pregnancy, the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated so long as their purpose is to persuade the woman to choose childbirth over abortion, so long as the information that the informed consent statute requires the doctor to convey is truthful and not misleading and so long as those measures do not unduly burden the woman's right to choose.

Thus, the Casey Court held that an informed consent to abortion statute will be upheld even if it is designed to persuade the woman to choose childbirth over abortion, so long as the statute does not unduly interfere with a woman's right to make the ultimate decision and is reasonably related to the goal of trying to persuade the woman to choose childbirth over abortion and requires the

physician to impart only truthful and not misleading information.

Here, the statute could not go any further in requiring the transmission, the offering up, if you will, of truthful and not misleading information because the statute requires that at least in so far as the sonogram and the fetal heartbeats sound are concerned exact information. I mean, it's realtime -- a realtime view of the woman's unborn child and of the sound of the unborn child's heartbeat if that's audible. Nothing could be more true and accurate or scientific than those facts. There's nothing misleading about any of that.

THE COURT: Now, the State is not requiring the doctor to make the heart tone available in all cases, right? They only have to offer that --

MR. HICKS: That's correct.

THE COURT: -- if I understand correctly.

MR. HICKS: And indeed, Your Honor, the -- as I understand the statute, the State does not require the physician or other health care provider and to get through to the patient even with the sonogram. The sonogram, as I think the Court observed earlier, has to be displayed on a monitor in the room. To me, it would -- I think it would be more than sufficient if the monitor were at a 90-degree angle to the woman's head so that she could make the

decision whether to avail herself of the opportunity, and the statute clearly says the information is only to be offered to her, not to be forced upon her.

In addition, the Casey Court stated that consent to abortion statutes that are designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden on the woman's effective right to choose, and the Court specifically concluded that the psychological health of a woman seeking an abortion is a matter in which the State has a substantial government interest.

The Court then said something that to me is compelling for the Plaintiffs' motion, and that is the Court said -- and this was repeated by a different majority in the Gonzales case. It said as fact that -- if I'm getting this -- if I'm repeating it correctly -- that a woman who goes to get an abortion who is not shown the fetal sonogram, who is not shown an image of her unborn child, and who elects to abort, and who then some time down the road sees the image of an unborn child with its members, with its eyes, with its head, and other human features, may suffer what the Court termed "devastating psychological injury." The court in Gonzales went much further in describing that sort of psychological injury.

So, again, it seems to me that the State is

supported not just by Casey in requiring that a physician at least offer this information to the patient if she is willing to look at it --

THE COURT: Of course, this -- you know, this statute goes further than offering, don't you think?

MR. HICKS: No, ma'am, I do not. I believe, as I said earlier, that the statute simply requires the physician to put out a monitor and to say to the woman, you're free to look at this. This is what -- it's going to depict -- it's going to be the sonogram of your unborn -- of your fetus or embryo. You may look at this. You're free not to look at this. I believe, as I've already said to the Court, that a physician, particularly if the physician feels the way I believe the Plaintiffs do in this case, can and probably would adopt some technological method such as a dictation mask that would make it feasible for the physician to dictate the description that's required by the statute into the mask so that it could only be heard by the woman on her earphones if she elected to turn on the turn-on button and not if she elected to turn the earphones offer.

In short, I absolutely reject the argument that this information is information that inevitably will get through to the patient whether the patient wants to hear it and see it or not. That's just not true. Existing technology can prevent any such eventuality.

THE COURT: One way that this case is a little different from Casey is it requires speech by the doctor. As I understood Casey, it was materials to be made available. Do you think that's a distinction that makes any difference?

MR. HICKS: No, ma'am, particularly in light of the Plaintiffs' attorney's responses to the Court when the Court asked a similar question to them, and their response, as I understood it, was this is symbolic speech; and surely providing literature to a woman, written literature, or pointing her to a website that contains that literature or reading or speaking information through the telephone, surely at a bare minimum those acts would constitute the same sort of compelled symbolic speech, but I think it would go farther than that.

So to me, the Casey statute, which dealt with providing facts, documents, and that sort of thing, is different from this statute only in a very ironic way, and in a sense this is, I think, the nub of this case, Your Honor. I believe the more I read and hear the Plaintiffs' argument that their real grievance with the act is that the General Assembly is requiring that they offer information to a patient which is, just by its nature, so compelling, so powerful, that they fear it will be persuasive.

It would be, to my way of thinking, a very strange

thing if courts said you can provide cold record documents that are incredibly technical and boring and medical in their nature and scientific in their nature, that's okay. That's all to the good because it allegedly informs a woman and gives her the information to make a mature judgment, as the Casey Court said, about whether to have an abortion or not. And yet when a State says, well, we would like you to offer up information that really is interesting, compelling, something that really has the power to possibly change a mind or two, then precisely because it is powerful, there's an objection that the information is somehow unconstitutional.

Have I answered the Court's question?

THE COURT: Um-hum.

MR. HICKS: The Casey Court specifically held, Your Honor, that an informed consent to abortion statute may lawfully and constitutionally require physicians and other health care providers to inform a woman seeking an abortion of the availability of truthful and non-misleading materials relating to the consequences to the fetus, even when those consequences have no direct relation to her health.

Now, again, if Casey would allow a statute to require health care providers to provide materials that are relevant to those subjects, that is to say, the welfare of the fetus itself, even if it's unrelated to the Plaintiffs'

own health, then surely that same rule would apply to a different form of information that's offered optionally to the woman. The sonogram, the image of her child, the sound of the child's -- unborn child's heartbeat, the description if she wishes to hear it of the members and features of the child. There's no difference in principle. All of these things go to inform the woman and to enable her to make a decision on an informed basis about whether to abort the pregnancy.

The Casey Court also specifically upheld the validity of the 24-hour waiting period imposed by an informed consent to abortion statute as a reasonable measure to implement the State's interest in protecting the fetus.

Finally, the Casey Court dismissed out of hand the Plaintiffs' argument that an otherwise valid informed consent to abortion statute is unconstitutional simply because it interferes with the doctor-patient relationship and the argument that the abortion provider's First Amendment speech rights are violated by such a statute. Casey specifically dealt with those two issues. If Casey applies here, and I believe it does -- I believe any faithful, fair reading of Casey demonstrates that it does apply here -- if it does, those two arguments are out the window.

Thus, in the State's view, the issue presented by

the Plaintiffs' facial challenge to the statute is whether the North Carolina informed consent to abortion statute requires them to communicate information that is truthful, not misleading, and that creates an obstacle, a meaningful, significant obstacle to the woman's practical ability to have an abortion.

THE COURT: You know, you said something a minute ago about moral issues here. So is it your position that -- this would go further than what the State actually did. But under your argument, could the State require the doctor to say to the patient that abortion -- you know, pick your statement, but abortion is morally wrong, or abortion is killing, or something like that. I mean, a lot of your argument sounds like you think that the State could make the doctor deliver that message to the patient so long as the patient could put her iPhone, you know, turn her iPad on -- her iPod, okay, her iThing, her iPad, her i -- you know, her music thing on before the doctor delivered the message. And I'm joking about it, but obviously it's very serious. Is that something you think the State could do?

MR. HICKS: I don't know, Your Honor, and I'm not saying that to dodge your question. I honestly don't know. What I said was simply that comes right out of Casey. Casey specifically says that a statute -- an informed consent to abortion statute may discuss the moral consequences of

abortion, I think the moral and philosophical underpinnings of abortion. And I would simply --

THE COURT: So direct me to exactly where it says that part.

MR. HICKS: Will you give me a moment, Your Honor?

THE COURT: Uh-huh.

MR. HICKS: If you'll just bear with me, Your Honor.

THE COURT: Yeah, take your time.

MR. HICKS: Thank you. Your Honor, I'm looking at page 872.

THE COURT: 872?

MR. HICKS: Yes, Your Honor.

THE COURT: Okay. I see it. Philosophic and social arguments?

MR. HICKS: Yes, Your Honor, and there's also discussion -- at some point they use the word "moral implications." But this is -- maybe I spotted this immediately, but I'm confident that the word "moral" or "morality" is contained in one of the Court's statements about what the statutes can do, and I would be happy to provide the Court with a supplemental letter brief or something that will identify the exact quote.

THE COURT: All right. Well, I'll read it again.

MR. HICKS: May I answer your question, though,

because I don't think I really did.

THE COURT: Yes, go ahead.

MR. HICKS: If I recall correctly, the Court asked me whether I would go so far as to say that an informed consent to abortion statute may dictate that the physician says something like an abortion would kill an unborn child or it's immoral or something really strong like that, and I think I said to the Court I really don't know the answer to that.

That is not the case here, and it's important to say that. That is not what the General Assembly did here. It may be that if a physician's imposition of authority were required to make judgment calls, value judgments like that, that that would go too far. I mean, that may very well be, and that is not our case, and that's not what the act requires.

I would also --

THE COURT: So you'd basically disagree with the Plaintiffs when they say this is ideological speech?

MR. HICKS: Yes, absolutely, Your Honor. If it's ideological speech -- see, I'm not even sure I understand what that term really means in the context of informed consent to abortion statutes, because Casey says that statutes that do almost everything -- in fact, I think everything that this statute does are okay. It specifically

says they are okay. So if that's ideological speech for the State to simply say we have a profound preference for potential life, Casey says the State can say that. It can require a physician to transmit the State's message if that's the message.

What is perhaps being lost here, though, is this. Note that the statute ultimately really requires a certain minimum communication of information. It does not require -- it doesn't say to the physician this is all you shall say, and you're not entitled to say another word; and it doesn't tell the physician, for the most part, how to say these things. For example, there's nothing in the statute after the physician has imparted the information that the statute requires -- there's nothing in the statute that would prevent the physician from saying, look, my own view, as your physician, is that the information that I've just given you or just offered to give you, which you have chosen to ignore or not to ignore, is really not very relevant to your decision in your circumstances to have an abortion. I don't believe as your physician that there will be any untoward psychological consequences to you in the future if you have one. There are any other number of things a physician could say if he or she were so inclined, and the statute doesn't forbid that. It doesn't restrain any of that.

Now, getting back to whether the information required to be communicated but not received in this case is -- would pass muster under the Supreme Court's decision, the Supreme Court in Casey said all information required to be communicated must be truthful and not misleading. Again, the information here couldn't be more truthful. It couldn't be less misleading. It's scientific and medical in nature. It's not only absolutely factual, but it's information that's specifically tailored to the woman who is considered -- the individual woman who is considering having an abortion.

In addition, all the information that's required by the statute is designed to assist the woman in making an informed and mature decision about whether to have an abortion or deliver her child. That's specifically permitted by Casey. It specifically says a state statute that does that is okay.

Furthermore, the information required by the act to be communicated is also designed to promote the State's interest in protecting the woman from the future devastating psychological health consequences, which at least the Casey Court, the highest court in the country, and the Gonzales Court found, would, in fact, ensue if the woman had the abortion without knowing this information and then later for the first time came upon this information.

The Gonzales Court went to much greater lengths than the Casey Court in articulating what it, it appears to me, concluded as a fact are the devastating future psychological consequences and injuries to the woman if she is not offered this information prior to having her abortion. In terms of --

THE COURT: I mean, that's an interesting point. If that's so, then why can't the State force her to look at it and listen to it?

MR. HICKS: I don't know that the State can't. The General Assembly decided, for reasons which I'm not aware, not to go that far. I can surmise. I can conjecture and guess that they thought it was prudential not to go that far and that they thought perhaps that Plaintiffs would make an argument in a court asking the Court to enjoin the statute, an argument that the Court -- that might be more moving and compelling to a Court if the Plaintiffs could say this -- the plaintiff -- or the poor woman has to listen to this, she has to be subjected to this, and it's enormously upsetting. Perhaps that's why the General Assembly chose to make this elective rather than not elective.

But the fact is the statute does not require the woman to look, to listen, or to receive this information. She is indeed free to elect -- just as she's free to elect to have her abortion or not, she's free to elect to receive

this information or not. And in that sense, I believe, the statute, just at a common sense level, is reasonable. It's not oppressive. It does not punish her. It does not force her into an emotionally difficult situation.

Have I answered the Court's question?

THE COURT: Um-hum.

MR. HICKS: I was going to go on, Your Honor, to address the question of whether the act's informed consent provisions are rationally related to protecting any interest that the State has a legitimate interest in.

And, again, under the specific language in Casey, as reinforced by Gonzales, the act's informed consent provisions are rationally related to protecting the woman's future psychological health, something that's specifically recognized by Casey, to the State's interest in promoting the potential life of the unborn child; again, something that's specifically recognized by Casey and Gonzales as legitimate governmental interest and the State's interest in ensuring that the woman not undergo an abortion without at least having an opportunity to fully appreciate the consequences to herself and to her unborn child.

In terms of the void for vagueness argument, I will direct the Court's attention to Gonzales. The Court in that case specifically held that the act at issue there, like the act -- the act at issue there was a criminal

statute. The act at issue here is not. The Court found that significant.

THE COURT: So what does it mean -- why is it in the statute there at the beginning of 90-21.85(a), the statute we're mostly talking about, it says, "Notwithstanding GS14-451." Well, I believe the 14s, that's criminal law.

MR. HICKS: It is.

THE COURT: Yeah, so why is that there? What is the purpose of that phrase?

MR. HICKS: My understanding of that -- my reading of it is simply this, that the General Assembly was saying there are criminal statutes that regulate in a criminal way the performance of abortion. Despite those, putting those aside as not being applicable here, the civil liabilities for violating this statute are X.

Now, it may be that that was not the most artful way to state this, but I think the Court would have to twist itself into the shape of a pretzel to come to the affirmative conclusion that there is criminal liability in the statute, and I would just ask the Court to consider this: If I were representing a criminal defendant charged with a crime under this particular statute, a physician, for not complying with this statute, I'd ask the Court to consider whether the Court would look favorably upon my

argument that, oh, Your Honor, you have to be kidding. Criminal statutes have to be clear. There can't be any doubt about whether they impose a sanction. This statute doesn't meet that standard by a long shot. At most, at most, in the context of a case where Plaintiffs want the statute to be held unconstitutional, they point to that screwy choice of phrase and say the statute is criminal, and it's not.

THE COURT: So you're saying that basically that's in there to make it clear it's not --

MR. HICKS: It's not --

THE COURT: -- criminal?

MR. HICKS: It is not criminal, and that's there to make clear it's not criminal.

Your Honor, in Gonzales the Supreme Court also made a considerable deal out of the scienter requirement and said that scienter requirements alleviate vagueness concerns. There are very considerable scienter requirements in this statute. They vary from section to section, but they go from things like knowing, willful -- or not willful -- knowing, reckless. There's also a section of the act that I noticed for the first time this morning -- if I could just have a moment, Your Honor?

Your Honor, I would direct your attention to 90-21.81(2). This is the definition of attempt to perform

an abortion. It reads: An act or omission of a statutorily required act that under the circumstances as the actor believes them to be -- well, right there is a gigantic window of opportunity for Defendants who are being faced with charges that they've civilly violated this statute, the State would have to prove that the actor if -- excuse me -- what the actor actually believed the circumstances to be, but they go on to read: An act or omission of a statutorily required act that under the circumstances as the actor believes them to be constitutes a substantial step in the course of conduct -- I would argue the statute means -- that is planned to culminate in the performance of an abortion in violation of this article.

Well, I think there's a pretty substantial argument there that in order to be held civilly liable, the physician or other health care provider would have had to plan the course of conduct with a view to violating the act, with a specific view to violating the act.

Now, that's certainly not an intentional expansive mens rea requirement. It's perhaps, if anything, not very artful drafting. But the argument that this statute is a trap for the unwary and that there will be horrific consequences for physicians and health care providers if the act is not enjoined seems to me to be a stretch, a considerable stretch.

Your Honor, the Gonzales Court in addressing this very argument also noted something that needs to be noted here, a challenge to a statute that's based on arbitrary enforcement is also likely to be speculative when the challenge comes prior to any attempt by anybody to enforce the statute. We're here at the pre-enforcement, facial unconstitutionality stage. There's been no attempt by the State to enforce the statute. And so what we have is sort of a parade of terribles, a parade of possible terribles that, again, to me suggest that the Plaintiffs are trying to read this statute to create problems in order to show the Court that the statute needs to be enjoined.

As the Court in Gonzales says, the canon of constitutional avoidance reads every reasonable construction must be resorted to in order to save a statute from being held unconstitutional, and that should be done here. Now, Your Honor --

THE COURT: So can I ask you about that?

MR. HICKS: Of course.

THE COURT: 21.90(b), that's the should the woman be unable to read.

MR. HICKS: I'm sorry, 21 point?

THE COURT: 21.90(b), should a woman be unable to read the material, somebody has to read them to her. So does that mean what it says, or does it mean -- in which

case it does raise the question I asked you earlier, or does it mean that if the woman can't read or can't read it in the language that it's provided that somebody has to read it to her if she wants them to? I mean, do you read into that an option because people who can read English certainly have the option not to read the materials.

MR. HICKS: The Court is asking me whether the verb "presented" means that the woman must, of necessity, actually received the information?

THE COURT: No, uh-uh, I'm sorry. I'm looking at 90-21.90(b).

MR. HICKS: Oh, forgive me, Your Honor.

THE COURT: Yeah, I'm sorry. I may have misstated it.

MR. HICKS: No, I'm sure you did.

THE COURT: That's the one that --

MR. HICKS: Yes, Your Honor, I'm reading it now. Your Honor, I think the answer to your question is the information -- the subpart B refers back --

THE COURT: Um-hum.

MR. HICKS: -- to 90-21.82 --

THE COURT: Right.

MR. HICKS: -- and I believe that the information required in .82 is, by and large, the information that was okayed by the Casey Court for the Pennsylvania statute. In

other words, this is not -- this is not the fetal -- or the presentation of sonogram. This is a statement that there will be a fetal presentation or there will be a presentation of a fetal sonogram, there will be a -- if possible, if fetal heartbeat can be perceived, there will be a presentation in some manner of that information.

But I believe that found at .82 is essentially the information that was required for the Pennsylvania informed consent statute: The name of the physician who will perform the abortion, the medical risks associated with a particular abortion procedure, the gestational age of the unborn child, medical risks of carrying a child to full term, the fact of a display of a realtime view of the unborn child will be made, whether the physician has liability insurance or not, whether the physician has admitting privileges at a hospital within a certain number of miles.

THE COURT: I took it to be directed towards the printed materials referenced in -- I'm just going to use the last number, Section 82.2(e), which says the woman has the right to review the printed materials in GS 90-21.83, which is much more than what you were just talking about.

MR. HICKS: The physician has to or qualified professional has to inform the woman either by telephone or in person that, among other things, the woman has the right to review the printed materials described in .83 --

THE COURT: Right.

MR. HICKS: -- that these materials are available on a State-sponsored website.

THE COURT: And if she can't read those materials in English or if she can't read at all or Spanish or whatever language it happens to be available in, then according to Section 90(b), somebody has to read it to her.

MR. HICKS: That's -- I believe that's correct, and I believe that the only difference between that and Casey is that the physician or the qualified health care provider has to go a step beyond handing the document to the woman or citing her to a website.

THE COURT: Right.

MR. HICKS: Has to actually read it. But this is not the sonogram.

THE COURT: I know, but it is the part where according to 21.83 it has -- apparently then the doctor would have to read the dimensions of the unborn child, information about brain and heart functions, the presence of external members and internal organs, shall provide information about the methods of abortion procedures employed, and then, as you say, the medical risks, the possible adverse psychological effects. I mean, so the doctor actually has to actually -- I mean, I don't know exactly what the materials say, but that's what .83 requires

them to say, so --

MR. HICKS: It's my understanding of the statute, Your Honor, from my prior readings of it that the statute does not require the physician or the health care provider to read over the telephone or in person a description of the fetal anatomy --

THE COURT: Okay.

MR. HICKS: -- a reading of the sonogram. It does -- I agree with you, it does require that the physician, among other things, if the woman -- if the physician believes that the woman cannot read English or Spanish, would require the physician to read the materials over the telephone or in person, the written materials, to her that are prescribed in .82. But I do not believe that it requires the physician to go beyond that and say you have to come in here, let me perform a sonogram, and then either read to you what the sonogram says so that you will absolutely hear it or let you hear the fetal heartbeat, and I thought that's what I heard the Court asking.

THE COURT: No, I'm not talking about the sonogram or the ultrasound or the fetal heartbeat at all. I'm trying to find out what that subsection means. If she's unable to read the materials provided, then the physician or qualified professional has to read those materials to her.

MR. HICKS: I believe you're right, Your Honor.

THE COURT: So what materials?

MR. HICKS: I believe these are the materials that are specified in 90-21.82.

THE COURT: Uh-huh, and that would be?

MR. HICKS: Oh, I'm sorry. That would be --

THE COURT: I mean, it looks to me like it refers to --

MR. HICKS: I think it's the printed materials that are described -- I'm reading from -- I'm reading from 90-21.82(2) --

THE COURT: E.

MR. HICKS: E, yes, Your Honor. I believe that the health care provider would have to read to such a woman the materials described -- printed materials described in GS 90-23.83.

THE COURT: And then when you look and turn at those -- well, I turn. I don't know how yours is printed out. But that's where I was reading to you in sub -- in .83(a)(2), the information about dimensions and external members and internal organs and such.

MR. HICKS: Well, these are the materials that current -- well, these are the materials that would have to be provided physically or through a website by mail or in person to a woman, and they do indeed describe among many other things --

THE COURT: But if she can't read them, then the physician has to read them to her.

MR. HICKS: Yes, that's my reading of the statute, Your Honor.

THE COURT: Okay. And so she does not have the option, like people who can read English or, presumably, Spanish, I don't know what other languages maybe it's being done in, of not reading it. She has to --

MR. HICKS: Well, she has the option of not reading it.

THE COURT: Well, she has the option of not reading it, but of --

MR. HICKS: Of ignoring it.

THE COURT: I guess she -- her only choice is if she doesn't want to hear it, she also has to put her earbuds in.

MR. HICKS: Your Honor, I don't know that my practical life experience is universal for everyone, but I have been accused many times by my wife of being in a room with her while she tells me important things, and somehow I totally miss them. I don't believe that all human beings listen to all the information that is spoken to them. If so, every student in school would be an A student. No, I don't believe that a woman is compelled in any meaningful sense to actually perceive this information, but I take your

point, and I believe that you're correct in your understanding of the statute.

THE COURT: Okay. All right. Thank you. And I think I might need to take a short break. You may finish your argument, and I'll hear rebuttal. So why don't we take a 10-minute recess.

(At 11:50 a.m., break taken.)

(At 12:00 p.m., break concluded.)

THE COURT: You know, I was just going to say I think I have interrupted your argument a good bit, so I'll let you get back to where you were when I started asking you questions.

MR. HICKS: I'm happy to answer the Court's questions and appreciate it.

Your Honor, getting back to the question that you last asked me, again, I don't have a crystal ball, and I don't have inside information as to what the General Assembly intended by the provision that you questioned me about, but it strikes me just a matter of common sense that perhaps what the General Assembly was seeking to avoid by creating this language about reading to the patient was a situation where there's a patient who -- well, who just can't read, and the General Assembly thought, look, it just wouldn't be fair to treat -- well, I mean, the purpose of the statute is to inform.

THE COURT: Right.

MR. HICKS: It just wouldn't be fair -- it would be bizarre for us, the members of the General Assembly, to say on the one hand that the information that the statute hopes -- obviously hopes that the patient will receive, process, take into account, consider, it would be bizarre if we have high hopes that most patients will read that or perceive it, take it into account, and then along comes somebody who literally can't read and the General Assembly insensitively says, oh, well, who cares.

My sense is that probably in an imperfect world with imperfect solutions, that was probably something that was -- that they grasped at, perhaps imperfectly, to deal with that problem.

However, to me the larger issue, the larger point, is this. The statute doesn't contain any requirement for the offering up of information concerning a woman's decision whether to have an abortion or not that the Casey Court didn't approve, and the State doesn't shrink from saying that those requirements are constitutional and okay because the Casey Court said that, and that's the law of the land.

Now, Your Honor, as to the vagueness arguments that have been made, I'm looking at page 9 of the Plaintiffs' reply brief, there are five bullets that are identified there.

THE COURT: Page?

MR. HICKS: Nine.

THE COURT: Uh-huh.

MR. HICKS: Yes, ma'am, of their reply brief. Is the Court there?

THE COURT: Yes.

MR. HICKS: The first one is may a registered nurse who is a qualified professional provide all of the information required by .82? Well, I take -- I take that qualified professional registered nurse language as an alternative provision that the General Assembly has offered up, an option, something that makes the statute more convenient for the Plaintiffs, not less so, and don't think the Court should enjoin the statute because the General Assembly is trying to make it easier for the Plaintiffs to comply. I mean, the General Assembly could simply say the physician has to do this.

We've discussed .2 at length.

.3, can a nurse practitioner with a certification in obstetrical ultrasonography and experience in an abortion clinic fulfill the requirements of Section 90-21.85? Again, I think the statute provides a list of who can do this, and therefore, it seems to me, that enjoining the statute on the ground that one provider or the description of one provider is allegedly vague would be a very strange thing to do. The

General Assembly is trying to help these people by giving more options.

How does one make the fetal heart tone in a quality consistent with the standard medical practice when there is no practice of doing that at all? Well, there's presumably a standard medical practice today that defines how audible and loud and clear the tone of the fetal heartbeat must be for the physician himself to hear when the physician is examining an ultrasound, and my reading of the statute is that it has to meet that standard. It seems to me that's an effort to try to imagine how this language is constitutional rather than trying to find ways to say it's not.

What does the 72-hour provision mean if a woman has an ultrasound that complies --

THE COURT: So can I ask you about that to make sure I understand what you're saying?

MR. HICKS: Yes, ma'am.

THE COURT: You're saying if for some reason the doctor thought it was important for the doctor to hear the heartbeat, then whatever steps the doctor would take so the doctor could hear it, those are the steps the doctor has to take so the patient can hear it if the patient wants to hear it?

MR. HICKS: Yes, ma'am. That's my reading -- my

common sense reading of the statute. Surely what is good enough for the physician would be good enough for the patient.

THE COURT: Okay.

MR. HICKS: The doctor can't deliver quality medical advice and services without properly perceiving the sound. I assume that's true.

THE COURT: Okay. Go ahead.

MR. HICKS: And then finally, what does the 72-hour provision mean? If a woman has an ultrasound that complies with Section .85 four days before the abortion, is that okay? I take the statute to say, yes, it is okay, if the -- in fact, what I took that to mean is this, Your Honor. Again, I thought the General Assembly was trying to provide an alternative means so that if the physician -- if the physician who provides the ultrasound is not the same physician who is going to actually perform the abortion some days later, the 72-hour provision was put in place so that the patient could still go to the abortion clinic. The physician could provide the ultrasound and then another one of his partners could perform the abortion some days later. Again, that strikes me as an effort by the General Assembly to make the statute practicable and workable and not an under due burden for them. It doesn't strike me as something that the statute or the General Assembly should be

penalized for. Just giving them more options that might be helpful to them.

Are there any further questions that I can answer for the Court?

THE COURT: I did want to ask you about your brief, because the Plaintiffs did make this argument. In your brief when you -- on the First Amendment issue, the two interests that your brief talked about were the mental health of the mother and preventing coerced abortions, and you did not rely in your brief on the State's interest in -- it's phrased different ways in the cases, but, you know, the State's interest in promoting childbirth as opposed to abortion except in the due process section, so -- but you don't appear to have limited yourself here today.

MR. HICKS: No, Your Honor, and I believe that it is legitimate for the State to rely upon that part of Casey which says that the State may in these statutes express its preference for life. It may articulate its view, its prejudice, if you will, in favor of life and against abortion.

I would also point out, though, that there's nothing fanciful about the notion that a woman's health may be severely injured if she does not at least have the opportunity to receive the information that's at issue here. The Supreme Court itself made this finding. I mean, it went

way out of its way. It called it a "devastating psychological impact." The Court again years later in Gonzales went to even greater lengths in describing eloquently the sort of damage that it believed would be done. I just don't think it can be fairly stated today that there's no evidence for this. I believe there's the sort of evidence that this Court has to take notice of if it comes from the Supreme Court itself in the form of a finding.

THE COURT: Okay. I do have one other question.

MR. HICKS: Oh, yes, ma'am.

THE COURT: The statute doesn't have any opt out for if the doctor thinks that some part of this would be -- would cause psychological or psychiatric harm to the patient.

MR. HICKS: It appears to me that that is correct, Your Honor.

THE COURT: And does that matter in the analysis? Is that a factor that needs to be taken into account, maybe not on the First Amendment issue, but maybe it's just -- maybe it's more if the due process argument or the undue burden issue ever gets raised.

MR. HICKS: The State's view of that is no, Your Honor.

THE COURT: All right. I think that was my last question. Anything else you want to say to me?

MR. HICKS: For now, I think that's enough, Your Honor. I may have some comments after the -- after Bebe has made her argument.

THE COURT: Thank you.

MR. HICKS: Thank you, Your Honor.

THE COURT: All right. Ms. Anderson?

MS. ANDERSON: Thank you, Your Honor.

I think it might be helpful to sort of step back and see what .85 -- how it will play out as it's actually written, and that is that a woman who calls to have an abortion, among other things, will be told you have to come in four hours -- at least four hours ahead of time. We're going to schedule you for this mandatory ultrasound that the State's requiring now. She comes in. She's on the operating table and either having a vaginal or abdominal ultrasound performed. Depending on how far along her pregnancy is determines which type of ultrasound is typically used. And while that's happening, the physician turns the screen so that it's in her view. The statute requires that it be -- the images be displayed so that the pregnant woman may view them. So he turns the screen so that those images are in the view.

If the woman says to the physician I don't want to look at those images, I don't need to see that, I don't want that as part of my decision-making, the physician has to

say, I'm sorry, the State says I have to put those in your view, whether you want to look at them or not, but the State says you may avert your eyes. So the woman's lying there, and she can, you know, put her eyes down, close her eyes, avert her eyes in some way and not look.

Then the physician has to describe -- provide specific information as part of the description and explanation. And though it is true that the law does not preclude the physician from saying other things, the State has cherry picked what the physician must say. It doesn't say the physician has to describe the images. The physician has to say if certain things are present. It doesn't have to say if they're absent. So, again, it is part of -- when looked at in its entirety part of the ideological package that this requirement embodies and this whole experience imparts to the woman.

So the physician starts to describe, and the woman says I don't want to hear that, I don't need to hear that, that would be very upsetting to me, or I already had an ultrasound, in fact, as you know, I'm here because the ultrasound showed a fetal anomaly, or, you know, I'm a 13-year-old incest victim, and I really don't want to hear that, that's going to be very upsetting to me, the physician has to say I'm sorry, the State requires that I provide this explanation and description to you; otherwise, you cannot

have a legal abortion. Now, it appears that the State feels that this is okay because the physician can try to obtain some sort of equipment, I don't know, noise-blocking earphones, some sort of a deposition mask or court reporter's mask that Defendants suggested. But in any event, this again -- I mean, this is -- she's here for this medical procedure the State's requiring, and so these sort of extreme measures have to be gone through to try to accommodate the patient's wishes in terms of the level of detail or the information she wants.

So that's what -- and also, of course, a physician has to offer to make the heart tone audible in a manner -- in medical practice. But as we've pointed out in evidence, they're -- as Dr. Stuart says, they're -- auscultation of fetal heart tone is not done as part of abortion practice. Dr. Stuart teaches medical students how to perform abortions at UNC. This is not part of what is taught as part of how to perform abortions. So there is no medical practice that involves making heart tone audible.

So that is what Subsection 85 requires. There is nothing at all in Casey like that. There's nothing at all in Gonzales like that. Gonzales didn't even involve informed consent requirements, much less, you know -- didn't involve any informed consent requirements, also didn't involve any ultrasound requirements. Casey involved

informed consent requirement, but no ultrasound requirements. So just as a factual matter, those weren't at issue before the court.

Now, it is true that in both cases the courts made some broad statements. They also made some limited statements, and they also ruled on what was in front of them. And in particular, Casey, in addressing -- it first addressed the undue burden claim; but then when it turned to the First Amendment claim of compelled speech in Casey, it didn't say, well, we've concluded there's no undue burden, so that takes care of the First Amendment issue, period. No, what they did is they said, okay, now we're going to turn to the First Amendment right, and they said what they're ruling on. All that's left of petitioner's argument is a, quote, asserted First Amendment right of a physician not to provide information about the risk of abortion and childbirth in a manner mandated by the State, end quote. That is not the type of information and experience at issue here set forth in .85.

And then the Court went on to say that, you know, the physician's First Amendment rights are clearly implicated, but in this context they're saying it's, quote, only as part of the practice of medicine subject to reasonable licensing and regulation by the State, end quote. Again, relating to, as we talked about earlier, informed

consent is something that the State is allowed to require that physicians obtain before performing any medical procedure.

THE COURT: Now, the State seems to say that Casey allows the State to require the doctor to make ideological speech to the patients. That's what I heard argued.

MS. ANDERSON: That's also what I heard argued, Your Honor.

THE COURT: Okay. So what part of that do you disagree with?

MS. ANDERSON: I disagree that Casey said that the State may require ideological information be imparted to women. Casey does not stand for that. Casey did not rule that the State may do that. Casey did not address that issue.

And, again, you have to look at Casey both in terms of what the Court actually said -- and just to -- and the first amendment part, it said -- again, what the Court actually said, it ended that analysis of the First Amendment claim by saying, quote, we see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here. It didn't say we see no constitutional infirmity when the State requires any information or the State requires ideological information or the State requires anything that is truthful and not

misleading. They didn't say that. They said the information here is all right under the First Amendment.

And, again, even when they are talking in the undue burden setting where they do talk about truthful and misleading and say that if it is, you know, truthful and misleading, it's not going to be an undue burden, they again limit themselves, though, in terms of what they say. They say that the State may require -- it's stated with reference to information about the risks and nature of the abortion procedure, risk of childbirth, and the probable gestational age of the fetus, that, quote, if the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible, and then it found the specific information before it in that case was permissible. It did not rule more broadly. It would not have been appropriate for them to do so, and it didn't. That's what the Court decided.

And also they say, again, in Casey, quote, we see no reason why the State may not require doctors to inform a woman seeking an abortion of the availability of materials related to the consequences to the fetus, even when those consequences have no direct relation to her health. So the Court allowed the requirement that a physician make available State materials that put forth some of the State's view of what's important for the woman's decision-making,

which is not the same as requiring that the physician describe to the woman and show the woman her own fetus before she can get a lawful abortion.

And so, again, the Defendants argue for a very broad reading of Casey which isn't justified by either the undue burden analysis of Casey, which is not their First Amendment analysis, or their First Amendment analysis.

Now, in terms of truthful and misleading, which again comes into their undue burden analysis in Casey, they again -- as I mentioned, they said it may be permissible. They did not say that anything that is truthful and not misleading is not an undue burden and, therefore, not a violation of privacy.

So, for example, Your Honor posited the idea that maybe the State -- what if the State said the physician has to say abortion is murder. Well, again Casey didn't say ideological speech is okay, and that I think would be clearly ideological speech. But what if the State said that an abortion provider has to say to every patient some people believe that abortion is murder. That is absolutely a true statement. It is absolutely true that in the United States today some people believe abortion is murder. However, that would clearly be ideological, impermissible under the First Amendment to make the physician be the mouthpiece for the State's statement about what abortion is.

And since the Gonzales decision, several courts have interpreted Gonzales -- the language in Gonzales and Casey and recognized that they did not -- the broad statements in those decisions did not give states carte blanche to impose any type of requirement under the justification that it's supposedly designed to inform.

So, for example, the Planned Parenthood versus Heineman case cited in our papers and in Defendants' papers out of Nebraska, 2010, found that the requirement about risk factors violated, you know, Casey and Gonzales -- or was not allowed under Casey and Gonzales. Again, limited what the State could do.

Similarly, in Planned Parenthood versus Dogard, which was a South Dakota case in 2011, First Amendment violation was found both for a requirement that a woman had to go to a crisis pregnancy center and provide information, but also that the risk factor information that the State was requiring physicians provide, that violated the First Amendment post Gonzales, post Casey

THE COURT: But didn't -- in both of those cases, didn't the Court find that that's because it either was -- basically was untruthful, I mean, it was misleading, that it was inaccurate?

MS. ANDERSON: Well, Your Honor, in both of those cases, they did focus a lot on the truthful/misleading

standard. Again, this was -- one of the big differences in those cases to our case is that was information that was sort of added to the list of what is going to be part of the informed consent requirements. So Casey starts out with their list in Pennsylvania; and since then, states have, you know, tried to add to that list, and sometimes they've gone too far, and sometimes they haven't. The point I'm making about that is that the State's -- the courts have recognized that Gonzales and Casey did not give carte blanche to anything just because it's designed to inform.

And, of course, the most relevant precedent or the most relevant decision is the Texas Medical Providers decision which actually looked at this type of -- the requirements in this type of statute and there found that those ultrasound requirements clearly violated the First Amendment rights, and clearly the Casey analysis, either under the First Amendment or undue burden, did not apply to that First Amendment claim asserted in the Texas case.

And along with misstating -- or what Casey stands for, Defendants have also misstated what Gonzales stands for, and I just want to make sure there's no confusion in the record. Again, Gonzales had nothing to do did with an ultrasound requirement, nothing to do with informed consent requirements like even in .82. The dicta that the Defendants try to rely upon repeatedly is in -- the Court

was talking about information about the specific medical procedure that women would receive, which again is a classic informed consent category of information, wholly unlike anything required by the ultrasound requirements here.

In terms of the purpose of this, it is even more confusing, I think, after hearing Defendants' response what purpose is served by these requirements. Defendant -- they've certainly misstated this is an offer. It is not a mandatory offer, it's a mandatory put it in her view, describe it, explain it. But they also -- Defendants also said that the act does not require physicians to get through to women and that there can be this mask and the on/off button on headphones so the woman hears nothing and the woman sees nothing. If that's the case, what possible purpose does it serve to require women to come in at least four hours ahead of time to have an ultrasound for this purpose and then, you know, they don't hear and they don't see, it is simply -- no purpose can be possibly served by that requirement.

Also relating --

THE COURT: So are you saying -- I'm trying to figure out the implications of what you just said. I'm sorry. I'm having a little trouble articulating it.

MS. ANDERSON: Should I try to re-articulate?

THE COURT: Okay. Yes, go ahead.

MS. ANDERSON: I think that there are several points to this that I'm trying to make, Your Honor, and will try to make more clearly.

No. 1, Defendants are misstating what this is. This is not an offer. These are mandated experiences and symbolic speech that's required. And they try to justify those requirements by saying that they're going to prevent psychological harm and coercion and then also promote the potential life. Well, they have no evidence whatsoever that these requirements are going to in any way protect women from psychological harm, no evidence that women are harmed by not being required to have the image put in their view and the information be imparted through the physician's mouth and later seeing or hearing a fetal heartbeat, which is their premise for their psychological harm related to .85. They have no evidence and there's no logic to say that those requirements will prevent women from being coerced into having an abortion.

So, moreover, they say that the women may turn off -- you know, look away, and they do not have to hear. So they're acknowledging that really this is -- it's one way in which they are acknowledging that this is not narrowly tailored, this is overbroad, and the overbroad aspect to it serves no possible purpose. It serves no possible purpose to force the women to come in four hours early if they're

going to choose not to look and not to hear.

And as I mentioned before, if that's the case, and it clearly is, it can't possibly serve a legitimate purpose, then what purpose is served -- then it would not make sense to then say, well, that's all right, that's an acceptable -- that's okay. The State can do that. The State can require women to come in and go through the charade and to put on these headphones and turn on the off switch and look away, and yet they're still going to have to wait four hours to contemplate something they didn't see or hear, and yet -- you know, so that makes no sense. But then if the State says, all right, we'll allow for it to be enjoined as to those women who don't want to see or hear, then clearly you would have to let women know when they're scheduling you have this opposition, which clearly defeats the State's purpose.

So there's -- this whole bundle of what they're requiring doesn't match what they say it is, doesn't match anything in Casey and Gonzales, doesn't match anything upheld by any court in this country, and doesn't hold together and make sense in terms of serving a purpose and serving a purpose in a narrowly tailored -- by a narrowly tailored means

THE COURT: So I think maybe I've figured out how to say my question. Do you have the statute in front of

you?

MS. ANDERSON: Yes, I do, Your Honor.

THE COURT: Okay. So looking at 21.85, it says in sub A, at least four hours before the procedure, you have to come in. And then the first thing that happens there in sub sub one is you have to have the ultrasound. And then you've got these other things that we're talking about.

So you are saying that if the require -- what have you been calling them -- the speech and display provisions violate the defendant's First Amendment rights, then that means sub one is unnecessary because it has no purpose, and it's -- but it's not unconstitutional by itself, is it? Or are you saying that on First Amendment grounds and on the basis of the arguments you're making today?

MS. ANDERSON: Right, Your Honor. We're certainly not saying that it's unconstitutional to require an ultrasound, and, in fact, the law currently requires an ultrasound.

THE COURT: Okay.

MS. ANDERSON: This law changes those requirements, and part of the changes is you have to come in four hours early, and it's -- only limited people can do the ultrasound, not everyone who is qualified to do an ultrasound. And why is it changed that way? Because it's then so that this display can be put in your view and this

explanation and description can be provided to you. That's the purpose of changing the requirements in terms of the temporal requirements and who performs the ultrasound.

So if the temporal -- if the requirement that the display be put in your view and the explanation of the description be provided does, as we say, as Plaintiffs say, violate First Amendment rights of the physicians and is struck, there's no purpose to these changes to the rest of the law. And, again, it's looking at the law in context and seeing the totality of the new requirements, what does this law change? And by the way, that's one way in which this law is different than Texas. Texas did not have any requirement preexisting for an ultrasound. Here we have that in North Carolina.

And so there already is going to be an ultrasound. A woman is already going to have the opportunity to look at the screen, look at the images, ask for them to be explained. So this -- peeling off this piece and just leaving one serves no purpose if, as we assert, the rest of the package is found to be a violation of the physician's First Amendment rights.

In terms of -- Your Honor was asking Defendants about this provision about reading it. We certainly -- Plaintiffs read 90-21.90(b) where it says "unable to read the materials provided to the woman pursuant to this

section" to be referring to, I think, what Your Honor was focusing on, which is the part of 90-21.82(2), which is E, which is the -- states the woman has the right to review the printed materials described in Subsection 83 which is the State materials, and then further on in subsection three of 90-21.82, it again says the woman has to be informed of her opportunity to review the information. So, again, we would submit that it doesn't make sense and isn't appropriate for the Defendants to require that a woman who is illiterate has to have the materials read to her when other women do not have to read the materials, and they clearly do not have to read the materials under the language of the statute.

Just to turn quickly to the scienter issue which Defendants addressed, they leave out the fact that there are administrative penalties, that there's serious licensure penalties if a physician performs an abortion in violation of law. There is no scienter there. In the Gonzales case, there was scienter. It was a criminal law. It has scienter. And there is certainly Supreme Court case law that supports the position that someone is not required to try to comply with a vague statute and then wait and see if they get sanctioned, penalized, criminalized -- penalized in some way, and for -- one case that stands for that principle is Babbit v United Farmworkers National Union at 442 US 289, 1979. So certainly Plaintiffs should not be put in the

position of having to sort of take a chance that they're interpreting unclear provisions correctly and then see if they are sanctioned or are sued or have some other penalty.

In terms of criminal penalties, Plaintiffs are not looking for trouble. Plaintiffs would be very happy if this law did not have criminal penalties or does not have criminal penalties. Initially reading it, I never thought it had criminal penalties. But then when you look at it more carefully and you see that reference to the criminal statute that is in .85 and not in any other section, again, statutory construction principles say you can't just ignore what the Legislature has put in there, you're supposed to try to figure it has some meaning, and so that's why there is this uncertainty for Plaintiffs as to whether there are criminal penalties.

But certainly we would be happy if there's an enforceable order that says there are no criminal penalties that would bind the prosecutors and their successors and so that physicians would not have to worry that they actually would be subject to criminal penalties under this law.

In terms of the vagueness that the response of Defendants, the reading -- it seems that they're proposing that one can read .82 saying that all of the information can be provided either by a physician or a qualified professional. They said that the Legislature was trying to

make it more convenient. Again, that is a reading that Plaintiffs would welcome, but not one that Plaintiffs feel they can safely assume given the contradictions in the statute and would certainly need something stronger than Defendants' statement in court that that's the reading. Again, would need protection of a court order binding Defendants and their successors.

In terms of the requirement as to who is a qualified technician, if the Legislature was trying to help by giving more options, as Defendants say, it would have helped if they gave an option that made sense in terms of medical practice.

In terms of the 72-hour requirement, again, Defendants have said now that it means that if a physician -- any physician, whether -- you know, I understand them to mean any physician doesn't have to be the physician who will perform the procedure. If any physician performs the ultrasound and does it within the 72- to 4-hour window and does the paperwork required here and complies that that would be acceptable, that is certainly a reading -- you know, if that -- we don't want that statute to -- provision to stand for other reasons. But if it were to stand, that would be a reading that would -- certainly is one plausible reading and certainly would be one that Plaintiffs could live with.

THE COURT: Well, what else could it mean?

MS. ANDERSON: Well, Your Honor, that's the thing. It's hard to know what it means. I think that it could mean that. It could mean that you have to have the ultrasound within a 4- to 72-hour window in any circumstances. It could mean that -- we're not sure what it means.

It just seems odd -- it wasn't written to clearly say that, because, for example, a lot of statutes regulating abortion put some informed consent or other requirements -- place it on referring physicians or just physicians generally. Here, you know, if they said for example "referring physician," that might have been clear. But if that's what it means, that would be again -- it seems that would be one possible reading of it. But other readings were that it couldn't be since the statute requires that it be the physician who performed the procedure in the general part. Does that mean this only applies if it's at some other facility? Defendants say no. That's certainly an acceptable reading if that's what it means. But it doesn't seem to be the only reading.

But, again, if the Court can do a limited reading to make some -- give some clarity based on what Defendants say and that would protect Plaintiffs so they could rely on that information, that would be helpful if that provision stands.

I think that one thing that's very important to point out, again, Defendants seem to imply, and I may have misheard, but seem to imply that Casey and/or Gonzales -- actually, the Supreme Court made findings that the type -- that women would be harmed if they did not look at an ultrasound image or hear the description. Clearly, neither of those cases stood for that. So, again, maybe I was mishearing what Defendants said because those cases, again, did not involve that at all.

And just as a point for the record, Defendants have misstated what Casey required. There were several other things in .82 that were not required in Casey, but that's not the basis upon which we're seeking a preliminary injunction, Your Honor.

Do you have any questions?

THE COURT: No. Thank you.

MS. ANDERSON: Thank you, Your Honor.

THE COURT: I'll give you a limited --

MR. HICKS: I won't take but a minute, Your Honor.

THE COURT: -- opportunity.

MR. HICKS: Just a couple points. One, I did not mention in my initial presentation something that I'm sure the Court already knows, and that is that there is a substantial, I would say, comprehensive severability clause in the statute that I believe would and should inform any

court's decision about a facial attack, particularly on the vagueness issues, the alleged vagueness issues.

Two, the scienter issue that Ms. Anderson raised, either I don't understand it, or, if I do understand it, I certainly don't agree with it because the provision -- the ethics provision of the North Carolina Medical Licensing Board that they cite in their brief essentially says that the licensing board can revoke, suspend, or do other things to your license that are bad if it determines that you have performed an abortion illegally in North Carolina. But in order to determine that an abortion has been performed illegally in North Carolina, one has to look at the statute which contains scienter requirements. So scienter, by definition, is important into what the licensing board would be able to do.

Finally, the Casey Court -- it's true. Ms. Anderson is right. The Casey Court did not say in these words that a State can require a physician to give what Ms. Anderson calls ideological speech. What I was trying to say to the Court when the Court asked me this question was that, as a practical matter, I don't think that the term "ideological speech" has much meaning anymore after Casey, at least not in the context of consent -- informed consent for abortion statutes because what the Casey Court said is definitely okay are things that clearly are allowed to

impart the State's preference. I think profound preference, it said, for continued life of the child as opposed to abortion and many other things that impart the State's, I don't know what you want to call it, philosophical or ideological view, whatever you want to call it.

So to say that the Casey Court didn't okay ideological speech in this context, okay, it's true, the Casey Court didn't use those terms. But I think if you look beyond quotes and look at what the Casey Court really did put its imprimatur on, if that's not ideological, I'm not sure what is.

Your Honor, one final point, and that is this. It's not possible for me to know at this point what the Court's views are about the vagueness issue or, for that matter, any others, and I'm also a little confused by the evidence. If the Court wishes us to come and present evidence in December, that's what we would like to do.

If the Court, however, is going to issue or proposes to at least decide on the question of whether to issue a temporary restraining order based on its view of evidence tendered by the Plaintiffs, I think the Defendants would like to have the opportunity very quickly and expeditiously to present the Court with counterevidence. If the Court is going to decide this facial challenge on evidence, then I think we'd like to have the opportunity to

at least put it in the record.

THE COURT: All right. Thank you.

MR. HICKS: Thank you, Your Honor.

THE COURT: Anything you want to say?

MS. ANDERSON: Thank you, Your Honor, just I wanted to mention that, of course, we would object to any delay in any decision on injunction so that Defendants could put in evidence. They have had an opportunity under the Court's scheduling order to do so. They chose not to do so. And they'll be -- you know, abortion providers and women seeking abortions will be harmed if this law is allowed to go into effect, and, therefore, we would oppose any submissions at this time by defendant or certainly any submissions that would have the potential to delay in any way the Court's decision. Thank you, Your Honor.

THE COURT: Thank you. Let me ask the State one more question.

MR. HICKS: Yes, Your Honor.

THE COURT: The argument -- you all have gone back and forth, so I don't know exactly when this was made. But the Plaintiffs' argument that the 4-hour delay after the ultrasound does not have any purpose if the remaining provisions were to be put on hold for whatever reason, what do you say about that?

MR. HICKS: First, I want to be sure I understand

it. I thought I heard Ms. Anderson's argument to be that if a woman comes in seeking an abortion and says I do not want to receive that information, then what could possibly be the point of making her wait four hours. Is that a fair characterization of what she was saying?

THE COURT: You heard the same thing I did. I mean, I guess, what I'm trying to understand is does the State say there is a reason for requiring people to come in four hours before the procedure to have the sonogram if the doctor does not have to provide the visual display and the words that go with it?

MR. HICKS: As our brief stated, Your Honor, and, again, I want to be clear about this, the State does not shrink from this. I understand the statute, and I believe that my colleagues understand the statute to intend to offer up to the woman seeking an abortion information that the State believes is profoundly necessary in order to adequately inform her decision about whether to have it. And I believe that the statute is designed to present information in a form that is far more powerful than simply a piece of paper. And, therefore, I take it that the 4-hour period, whether the woman decides to avail herself or not, is intended as a period of sober reflection for the woman on whether she should have looked at the information, whether she should now change her mind and say I would now like to

see it --

THE COURT: Okay. But maybe I'm not -- I must not be asking my question the right way. Just -- I don't know what I'm going to do yet, so, you know, this is not code.

MR. HICKS: Yes, Your Honor.

THE COURT: But I'm trying to not get you to come back or have lots of fights about what orders say, you know, when I get there, so I'm trying to think of all my questions.

MR. HICKS: Yes, ma'am.

THE COURT: So if the Court were to say that an injunction would be appropriate just -- an injunction would be appropriate on the -- what the Plaintiffs have been calling the speech and display, the part that says you have to show them the ultrasound and you have to describe to them what is visible on the screen, if that violates the physician's First Amendment rights, then is there any remaining purpose to the other provision of subsection 85 or .85 that requires you to come in four hours early for the sonogram? I mean, does it all stand or fall together in that way?

MR. HICKS: I believe it does. I think the 4-hour period itself is a signal to the woman that this is a solemn occasion in which the State is giving you a cooling-off period, a 4-hour period to soberly and judicially consider

your next step, whether she receives the information or not, whether she avails herself of the information or not.

THE COURT: Okay. Thank you. Okay. So the one thing that I think might be helpful to me, being a fairly concrete person, would be if I got some proposed orders to -- you know, injunctions are very specific things. So what I would like the plaintiff to prepare and submit would be one proposed order that would just address the First Amendment issue and doesn't address the vagueness or due process argument that you've presented. Then a separate one that addresses only your void-for-vagueness issues and breaking it down so that I can look at each one in particular. And then another one that just -- that addresses the void-for-vagueness issue that doesn't impose the injunction but addresses the concerns that you were saying needed to be addressed.

Now, of course, I'd would be happy for the defendant to do that, too. But if I rule your way, the order just needs to say "denied." So I'm happy for you to submit whatever you want, but it's not helpful in the same kind of way.

MR. HICKS: Is the Court afraid that my feelings will be hurt if you don't solicit an order from me?

THE COURT: I just want to be sure you know I'm happy to hear from you on this; I just don't want to make

you do something that doesn't seem to have a lot of purpose to it. And I'm asking the plaintiff to submit that more to help me think about it than I am for, you know, any argumentative purposes. So if you all can do that. Today is Monday. Can you get it to me -- I'm sensitive to the -- I believe it's next week, correct -- some time on Wednesday. Is that feasible?

MS. ANDERSON: Yes.

THE COURT: Okay. And --

MR. HICKS: Upon our receipt -- excuse me, Your Honor, may I?

THE COURT: Yes, uh-huh.

MR. HICKS: Upon the State's receipt of the proposed orders from counsel for the plaintiff, does the Court contemplate that the State may be heard in response to those report orders, or what is --

THE COURT: Well, that's what I was saying. I mean, I would be happy to give you the option of presenting alternative proposed orders that reach the same result if there's -- or that, you know, quarrel with the use of the language.

MR. HICKS: Yes, ma'am.

THE COURT: I mean, as I say, if I rule your way, I just throw those out the door and say "denied" because I don't have to really do a lot more than that, I don't think.

But if I'm going to enjoin somebody from doing something, then, you know, I need a fairly specific order, and I would welcome your thoughts not that that would be the wrong decision, but that the wording of it, that there's problems with the wording of it.

MR. HICKS: Yes, ma'am. That's exactly what I was asking.

THE COURT: Yes. So, you know, if you all get me something by Wednesday, and you get me something --

MR. HICKS: In response maybe by Thursday?

THE COURT: -- by Thursday, that would be all right. But I don't want either of these to argue really about the merits. You know, this would just be, as we used to say in state court, the form of the order. I assume that's a meaningful term here as well.

So, yeah, I don't really -- you all have argued the case and briefed it pretty thoroughly, so I don't feel the need for -- but I am sensitive to the way that things are worded. And so if I do decide to enjoin something, I don't want to do something unintentionally or cause problems that I'm not aware of. So I would like you all to give me very -- three separate, very specific ones and submit them electronically -- well, talk to Ms. Sanders about the way to submit that because there's some ways that you can do that that are more helpful than others.

MR. HICKS: Is a Word document acceptable to the Court?

THE COURT: Yes, I prefer it, never having mastered Word Perfect. Yes, I would prefer that. So if you all would get it to me by Wednesday; you get it to me by Thursday.

MR. HICKS: Yes, Your Honor.

MS. ANDERSON: Your Honor, if I could just get a point of clarification? Is the third proposed order you suggest one basically that would provide interpretations of the vague sections?

THE COURT: Well, you made an argument towards the end that so long as the State's interpretation was, in fact, what the law meant, then you were okay with that as long as there was an enforceable order saying so, and I took that to mean you were asking me to say so if I agreed with the State's interpretation. So that's what I was offering you the opportunity to present.

MS. ANDERSON: Thank you, Your Honor.

THE COURT: And, you know, obviously on that one, it would be particularly important for you all to be heard about the form or to offer an alternative way to say it.

MR. HICKS: I understand.

THE COURT: You know, I'm open to -- I really would probably prefer that you just offer me an alternative

way to say it rather than quarrel with the way that they have said it.

MR. HICKS: Yes, Your Honor.

THE COURT: Any other questions about the logistics or housekeeping matters? Yes?

MS. ANDERSON: Well, Your Honor, maybe then we could get our proposed order, that third one in by the end of tomorrow so that Defendants have until the end of Wednesday, and that way you would have everything by the end of Wednesday.

THE COURT: If you all can do it by tomorrow, then that's great. If you all are comfortable -- okay. You do it by the end of the day tomorrow, and then the State by the end of the day Wednesday. You still have 24 --

MS. ANDERSON: For the third one.

THE COURT: Oh, it's the third one only you were proposing to do that?

MS. ANDERSON: Well, I understood that to be the one the Defendants might need to respond to.

THE COURT: Well, that's the one --

MR. HICKS: We would like to look at all of them.

THE COURT: -- they would particularly need to, but I would want to give them the opportunity on all three of them.

MS. ANDERSON: Then could I suggest maybe that

within 24 hours of when we submit them, Defendants would submit their response. If we submit them in early, we will.

THE COURT: Yeah, I mean, the more time I have to think about it, obviously the better it is for me, but I don't want to give you all ulcers to get it done. So, yeah, if you'll get it to me, and you'll be serving each other by email, I assume, so it will be immediately available. Yeah, okay.

And then if you will hold the 6th and the 7th of December available.

MR. HICKS: Yes, Your Honor.

THE COURT: And then after I decide whatever I decide, you know, if I say no injunction, then we can discuss whether or not we need to have that hearing to give the plaintiff an opportunity to present whatever other -- I don't know if that's even necessary. It would seem to be more necessary if I do decide to do an injunction to give you all some opportunity to -- since this is all been very quick. But we can talk about that after I decide.

MR. HICKS: Yes, ma'am.

THE COURT: Anything else? All right. We'll be adjourned.

(At 12:56 p.m., proceedings adjourned.)

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C E R T I F I C A T E

I, JOSEPH B. ARMSTRONG, RMR, FCRR, United States District Court Reporter for the Middle District of North Carolina, DO HEREBY CERTIFY:

That the foregoing is a true and correct transcript of the proceedings had in the within-entitled action; that I reported the same in stenotype to the best of my ability; and thereafter reduced same to typewriting through the use of Computer-Aided Transcription.

Date: 10/31/11

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